RANGKAIAN HOTEL SERI MALAYSIA SDN BHD A

v.

HUSNI HUSSAIN

HIGH COURT MALAYA, ALOR STAR B
ZAINAL ADZAM ABD GHANI J
[CIVIL SUIT NO: 22-88-2006]
21 MARCH 2007

CIVIL PROCEDURE: *Injunction - Interlocutory mandatory injunction, application for - Franchise agreement regarding hotels entered into between parties - Application by plaintiff for injunction against defendant from continuing to manage and operate hotel - Principles applicable - Whether there were special circumstances - Balance of convenience - Damages - Whether it was just and equitable for injunction to be issued* C D

CONTRACT: *Consideration - Past consideration - Franchise agreement - Whether all terms and conditions in contract became executed consideration upon agreement being executed - Whether there was no requirement to provide any consideration prior to date of commencement even though agreement executed earlier - Contracts Act 1950, s. 80(c)* E

The plaintiff, the exclusive owner of a franchise business in hotels under the name "Seri Malaysia", and the defendant entered into two agreements – franchise agreement and premises management agreement – in which the defendant essentially became a franchise F holder for "Hotel Seri Malaysia" in Kulim. The plaintiff, contending that the defendant had failed to adhere to the payment obligations under the two agreements, filed an application praying for an injunction against the defendant from continuing to manage and operate the hotel. The plaintiff also prayed for various related G orders to preserve its interest and for the defendant to do all that was necessary for the hotel to be handed back to the plaintiff. The defendant in his affidavit-in-reply disputed the plaintiff's application on the following grounds: (i) the issue of past consideration as the franchise agreement was executed on 14 H January 2004 but the commencement date was 1 April 2004, causing the defendant to challenge the validity of the agreement; (ii) the letters sent by the defendant to the plaintiff were with the intention of avoiding litigation and to protect the defendant's reputation without abandoning his right to seek a counterclaim I

against the plaintiff; (iii) the plaintiff had failed to perform its obligations to the defendant under the agreements; and (iv) there were no special circumstances made out by the plaintiff for the court to grant the mandatory injunction sought.

Held (allowing the plaintiff's application):

(1) In respect of the issue of past consideration, when the defendant and the plaintiff executed the franchise agreement, all the terms and conditions as embodied in the agreement in law became executed consideration as they formed an integral and correlated part of the agreement, and therefore were valid and enforceable and not past consideration. Apart from that, a proper reading of the franchise agreement would show that the argument of past consideration by the defendant was actually a non-issue. All the necessary payments to be paid by the defendant as stipulated in the agreement were due and payable beginning only from the "Date of Commencement" or "Operational Date" respectively. There was, hence, no requirement for the defendant to provide any consideration prior to the "Operational Date" or the "Date of Commencement" even though the agreement was executed on 14 January 2004. Such a condition could not be termed as past consideration within the meaning of illustration (c) of s. 80 of the Contracts Act 1950. (paras 10 & 11)

(2) The plaintiff's case was supported by contemporary documents in the form of correspondence between the plaintiff and the defendant, including the defendant's post-dated cheques pertaining to the arrears of payment due from the defendant to the plaintiff. In four letters sent by the defendant to the plaintiff, the defendant explicitly admitted owing the arrears as claimed by the plaintiff. At no time did he deny the arrears due and that was further substantiated when, in his affidavit-in-reply, he never even referred to or denied his own letters. The defendant disputed the plaintiff's claim for the first time through his solicitor's letter dated 14 February 2006, *ie*, after the plaintiff had terminated the agreements by their letter dated 6 February 2006. There was, thus, nothing in any of the relevant letters to suggest that the defendant's admission of being in arrears was to avoid litigation. What transpired

instead was that his procrastination tactics resulted in the plaintiff being delayed in the pursuit of its right in court. (paras 12 & 16) A

(3) On the defendant's submission relating to the plaintiff's failure in its obligations to him under the agreements, the only mention of any problem in his letter to the plaintiff remotely referring to it was in a letter dated 15 April 2005, which was more an explanation rather than an attribution of blame to the plaintiff. Even the defendant's solicitors' letter to the plaintiff disputing the plaintiff's claim for the first time did not mention anything remotely related to any breach of obligation by the plaintiff under the agreement. So the defendant's claim on these grounds seemed to be nothing more than an afterthought. The defendant raised the matter for the first time in his affidavit-in-reply, and the plaintiff replied to each and every allegation by the defendant on this matter in its second affidavit, exhibiting relevant documents and letters to show that it had carried out its obligations diligently. There was again no response from the defendant by way of an affidavit-in-reply. (paras 17 & 18) B C D E

(4) The defendant's submission that there were no special circumstances in the plaintiff's case for the court to consider granting the mandatory injunction had no merit. The plaintiff was, under the terms of the agreements, entitled to terminate the agreements right from the beginning. Clause 7.3.2 provided that failure of the defendant as the franchise holder to pay as prescribed in both agreements (deemed as a primary condition) would entitle the plaintiff to immediately terminate both agreements. Upon breach by the defendant of that primary condition, the plaintiff was very accommodating in allowing the defendant's request to pay the arrears by instalments. However, the defendant wanted to settle the arrears only on his own terms and nothing else. The plaintiff indulged the defendant and allowed the matter to drag on for exactly one year before deciding to terminate the two agreements. Furthermore, the facts indicated that the defendant's hotel at the material time was not exactly experiencing financial losses; hence, the real problem could only be attributed, to put it mildly, to the defendant's managerial and financial F G H I

incompetence. The defendant should be more than grateful to the plaintiff for the indulgence accorded to him as the plaintiff could have taken the easy step of terminating the agreements right from the moment the defendant was initially in arrears of his payments. (paras 19 & 20)

(5) Based on all the facts, the plaintiff had successfully established that there were special circumstances in its favour for the granting of the mandatory injunction. The balance of convenience was also very much in favour of the plaintiff. Despite his clear admission of the arrears due and consequently being in breach of the agreements, the defendant would not surrender possession of the hotel to the plaintiff. Being in the hospitality business, the reputation and goodwill of the plaintiff was of paramount importance and a defect in any particular franchise would have a detrimental effect on it. The defendant had shown that he was incapable of managing the hotel as he ran into financial difficulties with his payments under the agreements almost immediately after the commencement of the operation, and his situation only got worse from then on. Any further indulgence from the plaintiff would have a negative effect on the other franchises in the hotel chain, which could not be compensated in pure monetary terms in the form of damages. Therefore, the defendant did not have any real defence to the plaintiff's claim and in the circumstances of this case, it was just and equitable that the plaintiff's interest be protected by the issue of the injunction. (paras 21 & 22)

Case(s) referred to:

Carabao Exports Pty Ltd v. Online Management Consultants Sdn Bhd [1988] 3 MLJ 271 ***(refd)***

Gibb & Co v. Malaysia Building Society Bhd [1982] 1 CLJ 85; [1982] CLJ (Rep) 99 FC ***(refd)***

Luen Heng & Co v. Oakes [1966] 1 MLJ 14 ***(refd)***

Malayan Banking Bhd v. Chong Hin Trading Co Sdn Bhd [2001] 6 CLJ 263 HC ***(refd)***

MBf Holdings Bhd v. East Asiatic Co (M) Bhd [1995] 4 CLJ 73 HC ***(refd)***

Ng Hee Thoong v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

South East Asia Insurance Bhd v. Nasir Ibrahim [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 SC ***(refd)***

Shepherd Homes Ltd v. Sandham [1971] Ch 340 ***(refd)***
Tinta Press Sdn Bhd v. Bank Islam (M) Bhd [1987] 1 CLJ 447; [1987] CLJ (Rep) 396 SC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 80
Rules of the Supreme Court 1957, O. 14

Other source(s) referred to:
Anson's Law of Contract, 1988, 27th edn, p 93

For the plaintiff - Abdul Shukor Ahmad; M/s Shukor Baljit & Partners
For the defendant - Chuah Thiong Gee; M/s Fadzil, Chua & Song

Reported by Suresh Nathan

JUDGMENT

Zainal Adzam Abd Ghani J:

[1] The plaintiff is the exclusive owner of a franchise business in hotels under the name "Seri Malaysia". On 14 January 2004 the defendant entered into two agreements with the plaintiff essentially for him to be a franchise holder for "Hotel Seri Malaysia" at Kulim. The two agreements were the Franchise Agreement and the Premises Management Agreement. The plaintiff's case basically was that the defendant had failed to adhere to the payment obligations under the two agreements. The plaintiff filed a writ of summons and by a summons in chambers prayed for an injunction against the defendant from continuing to manage and operate the said hotel. Apart from that the plaintiff also prayed for various related orders to preserve the plaintiff's interest and for the defendant to do all that was necessary for the handing over of the hotel back to the plaintiff. The plaintiff's prayer for a declaration (prayer 2) that the plaintiff has a right to take over the hotel from the defendant was withdrawn during submission.

[2] The chronology of the plaintiff's case as stated in their affidavits in support briefly are as follows:

Date	Letters/Events
14 January 2004	The Franchise Agreement and the Premises Management Agreement executed by the plaintiff and the defendant. In both the agreements the "Date of Commencement" was "1 April 2004".
	Under Schedule III of the Franchise Agreement the defendant was to pay to the plaintiff on the Date of Commencement a Franchise Fee of RM106,500 and an Advertisement and Promotional fund of RM5,5000; both not later than the "Date of Commencement" (ie, 1 April 2004). The defendant was also required to pay monthly a Royalty of 5% from the Operational Income and 2% from the same towards the Advertisement and Promotional Fund; both not later than the 14th of each month beginning from the "Operational Date" (ie, 1 May 2004).
	Apart from that the defendant was also required to pay 1 month rent in advance, various Deposits and Monthly fees under Schedule II of the Premises Management Agreement; beginning from the "date of Commencement" or "Operational Date" respectively.
28 February 2005	Plaintiff sent a letter to the defendant informing him that he was in arrears with his payments under the 2 agreements for the amount of RM221,960.42. The plaintiff also drew the defendant's attention to cls. 9.3 of the Franchise Agreement and 11.2 of the Premises Management Agreement that interest of 10% per

	annum was payable on the arrears sum. Apart from that the plaintiff stated that under cl. 7 of the Franchise Agreement, the plaintiff can terminate both the agreements for the non-payment.
15 April 2005	The defendant replied admitting the arrears due but however requested the amount due to be paid by 18 monthly instalments of RM15,361.32.
4 May 2005	The plaintiff replied disagreeing to the 18 monthly instalment but offered instead 10 monthly instalment of RM27,650 each with the final instalment of RM27,653.91. The defendant was required to start payment from 10 May 2005 inclusive of the current amount due at RM30,968.06.
6 May 2005	The defendant again appealed to the plaintiff for payment to be by 18 monthly instalments and in fact sent 18 post-dated cheques for the amount of RM15,361.33 each.
14 May 2005	The plaintiff replied, again disagreeing to the 18 monthly instalment and insisting to the 10 monthly instalments. The plaintiff returned 8 of the defendant's post-dated cheques requesting the defendant to send new cheques for the amount of RM12,288.67 to cover the current deficit.
24 May 2005	The plaintiff received an undated letter from the defendant sending a cheque for RM12,288.67. According to the plaintiff at that point the defendant had only settled the first

	instalment of the amount in arrears and the current amount due of RM30,968.06 was still unpaid. For the subsequent months the defendant paid by cheques of RM15,361.33 each without setting the current arrears.
20 July 2005	Plaintiff sent another Letter of Demand to the defendant stating the amount of arrears due from March 2005 to May 2005 to be RM91,045.61. A Statement of Account was also attached to the letter.
2 September 2005	The plaintiff's solicitors sent a Letter of Demand to the defendant for arrears amounting to RM348,738.64 to be paid within 14 days from the receipt of the letter.
15 October 2005	Defendant replied to the plaintiff admitting the amount due but however requesting the payment of the arrears to be rescheduled to 36 monthly instalments of RM9,687.19 each.
19 October 2005	Plaintiff replied informing the defendant that the Board of Directors rejected the defendant's request.
2 February 2005	The plaintiff sent to the defendant a notice of termination of the 2 agreements with effect from 6 February 2006 at 10am.
7 February 2005	As a result of the defendant's appeal, the plaintiff solicitors sent a Notice of Termination of the 2 agreements with effect from 28 February 2006 for non payment as of 1 February 2006 arrears of RM449,131.02.

14 February 2006	The defendant's solicitors replied to the plaintiff's solicitors denying owing the arrears sum of RM449,131.02 and stating that the plaintiff had no right to terminate the 2 agreements without an order of the court.

[3] The defendant in his affidavit-in-reply disputed the plaintiff's application and raised a number of issues. Firstly, the issue of past consideration as the Franchise Agreement was executed on 14 January 2004 but the commencement date was 1 April 2004 (defendant's affidavit wrongly stated as "14 January 2005"), ie, 2 1/2 months later. The defendant therefore challenged the validity of the agreement. The defendant then proceeded to dispute and deny the averments in various paragraphs (not all paragraphs as will be seen later) of the plaintiff's affidavit and put the plaintiff to strict proof thereof. Finally, the defendant raised a number of failures on the part of the plaintiff to honour his obligations to the defendant under the 2 agreements, among them was the plaintiff's failure to provide the premises with fire-fighting equipments; failure to give him any proper training; failure to advertise and promote the hotel; failure to give the necessary cooperation; and, failure not to discriminate between the franchise holders. Apart from that the plaintiff's counsel also raised some other issues in the course of his submission which I shall deal with later.

[4] The plaintiff's prayers are essentially an application for a mandatory injunction. The law governing the issuance of mandatory injunction is quite settled. In the Supreme Court case of *Tinta Press Sdn. Bhd. v. Bank Islam (M) Bhd* [1987] 1 CLJ 447; [1987] CLJ (Rep) 396 Syed Agil SCJ clarified the law as follows:

> ... The discretionary power of the Court to grant a mandatory injunction is provided by s. 53 of the Specific Relief Act 1950 (Act 1950 (Act. 137). By judicial process, and power is extended to the granting of an interlocutory mandatory injunction before trial. Such discretion however must be exercised and an injunction granted only in exceptional and extremely rare cases as was held in *Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yick* [1975] 2 MLJ 109 and confirmed by the Federal Court in *Sivaperuman v. Heah Seok Realty Sdn. Bhd.* [1979] 1 MLJ 150. The case must be unusually strong and clear in that the Court must feel assured that a similar injunction would probably be

granted at the trial on the ground that it would be just and equitable that the plaintiff's interest be protected by immediate issue of an injunction, otherwise irreparable injury and inconvenience would result, (see *Gibb & Co. v. Malaysia Building Society Bhd.* [1982] CLJ (Rep) 99, and *Shepherd Homes Ltd. v. Sandham* [1971] 1 Ch 340). Where the case is one of urgency, O. 29 r. 1(2) RHC 1980 allows an application to be made *ex parte.*

[5] Eusoffe Abdoolcader J (as His Lordship was then) in the Federal Court case of *Gibb & Co. v. Malaysia Building Society Bhd.* [1982] CLJ (Rep) 185; [1982] CLJ (Rep) 99, 101 in delivering the judgment of the court stated:

... Before we deal with the issues raised we should perhaps touch on a point made by Mr. Sri Ram for the appellant in referring to the judgment of this Court in *Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 MLJ 150 which, referring to a pronouncement to that effect in *Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok* [1975] 2 MLJ 109, 114, restates *inter alia* that an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases. That statement of the law is correct as an interlocutory application for a mandatory injunction is a very exceptional form of relief (*Canadian Pacific Railway v. Gaud* [1949] 2 KB 239, 249 (at p. 249)) but there is no reason why interlocutory or indeed interim mandatory injunctions should not issue in proper and appropriate cases and the Court has jurisdiction to so order. Fry LJ said in *Bonner v. Great Western Railway Company* [1883] 24 Ch D 1, 10 (at p.10): "I have no doubt of the jurisdiction of the Court to grant a mandatory injunctions as well as the hearing". The case however must be 'unusually sharp and clear' (*Shepherd v. Sandham* [1971] Ch 340), and the Court must feel a high degree of assurance that at the trial a similar injunction would probably be granted but we should observe that questions of degree are involved which depend *inter alia* upon considerations of hardship to the parties ...

[6] His Lordship then further added:

Whole relief granted by interlocutory order

The short answer to the issue in this respect is that the Court is not precluded from granting an interlocutory injunction where this would virtually give the applicant therefore on his claim the full relief actually sought to be secured at the final hearing when the

> matter is viewed on a balance of convenience (*Woodford v. Smith* [1970] 1 WLR 806, 817, 818 (at pp. 817-818); *Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok* [1975] 2 MLJ 109 (at p. 114); *Sivaperuman v. Heah Seok Realty Sdn. Bhd.* [1979] 1 MLJ 150. If there is plainly no defence to the action, and the only object in raising a defence is delay, an injunction should issue even if it gives the applicant his whole remedy before the trial (*Manchester Corporation v. Connolly* [1970] 1 Ch 420, 427) ...

[7] It was submitted on behalf of the defendant that, as shown in the defendant's affidavit, the plaintiff had failed to perform their obligations under the agreements. As such the defendant was not bound to reciprocate by making the necessary payments to the plaintiff. It was also stressed that there were no special circumstances made out by the plaintiff for the court to grant the mandatory injunction sought for (as in the case of *MBf Holdings Bhd. v. East Asiatic Co. (M) Bhd.* [1995] 4 CLJ 73). The defendant also submitted that the letters sent to the plaintiff by him were with the intention of avoiding litigation and to protect the reputation of the defendant without any intention of abandoning the defendant's right to seek a counter claim against the plaintiff. For this the defendant relied on the statement in a very brief oral judgment of Abdul Aziz J in the case of *Luen Heng & Co. v. Oakes* [1966] 1 MLJ 14. That case was an application under O. 14 of the Rules of the Supreme Court 1957 where the learned judge stated:

> It has been said that "the summary jurisdiction conferred by this Order (O. 14) must be used with care. A defendant ought not to be shut out from defending unless it is very clear indeed that there is no case in the action under discussion. Summary judgment under this rule should not be granted when any serious conflict as to the matter of fact or any real difficulty as to matter of law arises ... The whole case rests on the interpretation of that part of the letter offering payment by instalments to "avoid litigation" sent by Mr. Oakes as treasurer of the club. The letter, to my mind, can be interpreted to mean an admission of liability or an independent offer to protect the reputation of the club in respect of misfeasance on the part of the staff on the club.

[8] Finally, the defendant relied on the Brunei High Court case of *Carabao Exports Pty. Ltd. v. Online Management Consultants Sdn. Bhd.* [1988] 3 MLJ 271 where the headnote under "held", *inter alia*, reads:

A (1) The court cannot try on this interlocutory application the question of partnership or no partnership and it is impossible for the court to give judgment on the alleged admission based on this ground.

B (2) ...

(3) The admission must be a clear admission of all, and not simply evidence of some of the facts upon which the plaintiff relies to establish his cause of action.

C **[9]** Based on the aforesaid the defendant argued that he had not made any clear admission on the plaintiff's claim and in his letter dated 15 April 2005 the defendant raised 2 matters where the plaintiff failed in their obligations.

[10] First, on the issue of past consideration. When the D defendant and the plaintiff executed the Franchise Agreement all the terms and conditions as embodied in the agreement in law becomes executed consideration as they form an integral and co-related part of the agreement and therefore were valid and enforceable and not past consideration. The difference between E executed consideration and past consideration as explained in *Anson's Law of Contract,* 27th edn, 1988 at p. 93 reads as follows:

> Executed consideration must be distinguished from past consideration which is a mere sentiment of gratitude or honour F prompting a return for benefits received and, in other words, is no consideration at all. In the case of executed consideration, both the promise and the act which constitutes the consideration are integral and co-related parts of the same transaction. In the case of past consideration, however, the promise is subsequent to the act and independent of it; they are not in the substance part of G the same transaction. Thus if A saves B from drowning, and B later promises a reward, A's action cannot be relied on as consideration for B's promise for it is past in point of time.

[11] Apart from that, a proper reading of the Franchise H Agreement would show that the argument of past consideration by the defendant is actually a non-issue. All the necessary payments (in fact termed as "Balasan" in the agreements) to be paid by the defendant as stipulated in cls. 2.2 an 6.5.1 read together with Schedule III of the agreement were due and payable beginning only from the "Date of Commencement" or "Operational Date" I respectively. There was therefore no requirement for the defendant

to provide any consideration prior to the "Operational Date" or the "Date of Commencement" even though the agreement was executed on 14 January 2004. Such a condition cannot be termed as a past consideration within the meaning of illustration (c) of s. 80 of the Contracts Act 1950 (*Malayan Banking Bhd. v. Chong Hin Trading Co. Sdn. Bhd.* [2001] 6 CLJ 263). On this issue the Supreme Court held that the court should not take a strictly chronological view of the terms and conditions in an agreement (*South East Asia Insurance Bhd. v. Nasir Ibrahim* [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295).

[12] The next issue is to determine how strong and clear is the plaintiff's case against the defendant. On this issue it is settled law that the ordinary American Cyanamid principles are not applicable, for to grant a mandatory injunction in an interlocutory application there must be a high degree of assurance that, should the matters go to trial it would appear that the injunctions was rightly granted (*Shepherd Homes Ltd. v. Sandham* [1971] Ch. 340, *Gibb & Co. v. Malaysian Building Society Bhd*.) The plaintiff's case is supported by contemporary documents in the form of correspondence between the plaintiff and the defendant including defendant's post-dated cheques pertaining to the arrears of payment due from the defendant to the plaintiff. As can be seen from the plaintiff's affidavit the defendant through no less than 4 letters (dated 15 April 2005, 6 May 2005, 24 May 2005 and 5 October 2005) explicitly admitted to be indebted to the plaintiff pursuant to the agreements. In none of those letters did the defendant dispute the various amounts claimed by the plaintiff. Nor was it ever stated in those letters that since the plaintiff had failed to perform their obligations under the agreements the defendant was not bound to reciprocate by making the necessary payments.

[13] Revealingly, the defendant's letters to the plaintiff invariably carried the caption either "Rayuan Menyusun Semula Pembayaran Hutang Tertunggak" or just "Pembayaran Hutang Tertunggak" and each time will refer to the preceding letter from the plaintiff and the then current outstanding arrears due. Apart from admitting being in arrears with the plaintiff, the defendant in those letters in fact pleaded to settle the arrears by instalments and even proceeded to send to the plaintiff the post-dated cheques. In the defendant's letter to the plaintiff dated 5 October 2005, the defendant stated, *inter alia*:

A Untuk makluman pihak puan, setelah menerima surat tuntutan hutang tertunggak yang pertama, saya telah berusaha mencari wang yang sebanyak dituntut, tetapi tidak berjaya. Oleh sebab itulah, saya mengirim "post dated cheque" sebanyak 18 keping untuk membayar hutang tersebut. Tetapi pihak puan tidak
B bersetuju dan mengirim kembali 8 keping cek melalui surat pihak puan yang bertarikh 14 Mei 2005 (Ruj: RHSM/SF/01/25 Jld.3(94). Pihak puan hanya meluluskan 10 kali pembayaran sahaja iaitu:

Bayaran 1-9 : RM27,650.00

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Bayaran 10 : RM27,653.91.

Selain dari itu, pihak puan juga menuntut saya membayar bayaran semasa iaitu berjumlah lebih kurang RM30,000.00 setiap bulan. Berdasar tuntutan di atas, jumlah yang perlu saya bayar tiap-tiap
D bulan selama 10 bulan adalah lebih kurang RM57,650.00. Jika ditolak jumlah pada "post dated cheque" yang diterima oleh pihak puan iaitu RM15,361.33 sebulan, maka jumlah sebenar yang perlu saya tambah dan kirim kepada pihak puan setiap bulan selama 10 bulan berjumlah lebih kurang RM42,288.67.

E **[14]** In his letter dated 15 April 2005 to the plaintiff the defendant pleaded to settle the arrears amount by 18 monthly instalments. When the plaintiff replied rejecting the proposal and allowing only 10 monthly instalments, the defendant still appealed for the 18 monthly instalments through his reply dated 6 May
F 2004; and in fact sent the 18 post-dated cheques even though the defendant was aware that the plaintiff had rejected the proposal. By his letter dated 5 October 2005 in response to the plaintiff's solicitor's letter of demand dated 2 September 2005 for the full arrears sum, the defendant persisted in requesting payment
G of the arrears be rescheduled, this time to 36 months instead. The repeated admission by the defendant in this case is totally different from the circumstances in the case of *Carabao Exports Pty. Ltd. v. Online Management Consultants Sdn. Bhd.* Unlike in that case, in the present case, the defendant's admission of indebtness to the
H plaintiff was based on letters sent by the defendant himself and not from circumstantial evidence.

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[15] One thing that is very conspicuous from the defendant's affidavit in reply is that the defendant never referred to, let alone denied the paragraphs of the plaintiff's affidavit relating to all the aforementioned letters both from the plaintiff and himself. While he touched specifically on all the other paragraphs of the plaintiff's affidavit the defendant in his affidavit glaringly avoided referring to the relevant paragraphs of the plaintiff's affidavit which referred to those inculpatory letters. When the plaintiff in their affidavit had made such firm and clear allegations which are supported by contemporary documents, and as those allegations are not challenged or denied by way of an affidavit by the defendant, I am bound in law to treat those unchallenged allegations or assertions as an admission by the defendant. The Court of Appeal in *Ng Hee Thoong v. Public Bank Bhd.* [1995] 1 CLJ 609 stated the principle as follows:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382; *Overseas Investment Pte. Ltd. v. O'Brien* [1988] 3 MLJ 332.

[16] In the defendant's submission, as stated earlier, on the basis of what was said in the case of *Luen Heng & Co. v. Oakes,* the letters of the defendant were with the intention of avoiding litigation and to protect the defendant's reputation without any intention of abandoning the defendant's right to seek a counter claim against the plaintiff. As stated in the learned judge very brief oral judgment, "The whole case rests on the interpretation of that part of the letter offering payment by instalments to avoid litigation". However as stated earlier, in all the 4 letters sent by the defendant to the plaintiff, the defendant explicitly admitted owing the arrears as claimed by the plaintiff. At no time did he deny the arrears due and that was further substantiated when in his affidavit in reply he never even referred to or denied his own letters. The defendant for the first time disputed the plaintiff's claim through his solicitor's letter dated 14 February 2006, ie, after the plaintiff had terminated the agreements by their letter dated 6 February 2006. There was thus nothing in any of the

relevant letters to suggest that the defendant's admission of being in arrears was to avoid litigation. What transpired instead was that his procrastination tactics resulted in the plaintiff delaying in pursuing their right in court.

[17] On the defendant's submission relating to the plaintiff's failure in their obligations to him under the agreements, the only mention of any problem in his letter to the plaintiff remotely referring to it was in the letter dated 15 April 2005. To put the matter into its proper perspective I reproduce what the defendant stated in that letter:

> Sebagai tambahan, saya ingin menyatakan juga di sini perkara yang sudah pun pihak puan ketahui. Seperti yang dimaklumkan kepada pihak puan secara lisan dan surat bahawa pegawai akaun Seri Malaysia Kulim yang dicadangkan oleh pihak RHSM telah tidak menjalankan tugasnya dengan baik dan tidak bertanggungjawab. Saya telah meminta pihak RHSM membantu saya untuk membetulkan akaun yang dikucarkacirkan oleh pegawai akaun tersebut. Dan saya telah mengarahkan pegawai akaun tersebut supaya berhenti.
>
> Sebaik saja beliau diganti dengan pegawai akaun baru beliau telah berusaha untuk menyusun semula akaun-akaun Seri Malaysia Kulim dan beliau telah mula dapat menjelaskan sewa RHSM yang pertama. Walau bagaimanapun saya sedang meneliti akaun-akaun yang dikucarkacirkan oleh pegawai akaun lama itu dan jika terdapat sebarang penyelewengan maka saya akan mengambil tindakan yang sesuai terhadapnya.
>
> Sungguhpun demikian, saya masih tetap bertanggungjawab dan tetap akan menjelaskan segala bayaran yang ditetapkan oleh pihak RHSM kepada saya. Saya hanya memohon dan merayu kepada puan agar cara pembayaran tersebut dapat dijadualkan semula. Di bawah ini saya mencadangkan jadual Penjadualan Semula Cara-cara Pembayaran.
>
> Di bawah ini saya sertakan jadual pembayaran tersebut untuk pertimbangan dan kelulusan pihak puan:

[18] That letter was explanatory rather then attributing blame to the plaintiff. Even the defendant's solicitors' letter of the plaintiff which disputed the plaintiff's claim for the first time did not mention anything remotely related to any breach of obligation by the plaintiff under the agreement. So the defendant's claim on these grounds seems to be nothing more than an afterthought.

Defendant raised the matter for the first time in his affidavit in reply; and the plaintiff replied each and every allegations by the defendant on this matter in their second affidavit exhibiting relevant documents and letters to show that they have carried out their obligations diligently. There was again no response from the defendant by way of an affidavit in reply.

[19] The defendant did submit that there are no special circumstances in the plaintiff's case for the court to consider granting the mandatory injunction. In my considered opinion that submission has no merit. The plaintiff was under the terms of the agreements entitled to terminate the agreements right from the beginning. Clause 7.3.2 provides that failure of the defendant as the franchise holder to pay payment prescribed in both the agreements (deemed as a primary condition) will entitle the plaintiff to immediately terminate both the agreement. Upon the breach of that primary condition by the defendant, the plaintiff was very accommodating by allowing the defendant's request to pay the arrears by instalments. However, the defendant wanted to settle the arrears only at his own terms and nothing less. The plaintiff indulged the defendant and allowed the matter to drag on for exactly one year before deciding to terminate the two agreements. On 28 February 2006 the defendant by his letter dated 5 October 2005 even acknowledged plaintiff's assistance for his predicament, where he mentioned:

> Cadangan pembayaran ini dibuat berdasarkan kemampuan pihak kami dan unjuran pendapatan kami. Untuk pengetahuan pihak puan, setelah pihak puan menugaskan GWI untuk membantu kami dari segi pelan pemasaran Hotel Sri Malaysia Kulim, perniagaan kami telah meningkat. Terima kasih di atas keprihatinan dan tindakan segera pihak puan. Berdasarkan pelan pemasaran yang baru itu, insyaallah kami yakin dan percaya kami akan berjaya membuat pembayaran yang seperti dicadangkan.

[20] It is noteworthy that attached to the plaintiff's letter dated 20 July 2005 was a statement of account showing the financial performance of the defendant's hotel. The nett total revenue for the hotel for the period between May to December 2004 was RM1,138,363.21 and for the period between January to June 2005 was RM788,526.51. Again, this letter and the financial statement attached to it was not referred to, let alone denied by the defendant in his affidavit-in-reply or submission. So apparently

the defendant's hotel at the material time was not exactly experiencing financial losses. The real problem thus can only be attributed, to put it mildly, to the defendant's managerial and financial incompetence. The defendant should be more than grateful to the plaintiff for the indulgence accorded to him for the plaintiff, as stated earlier, could have taken the easy step by terminating agreements right from the moment the defendant was initially in arrears of his payments.

[21] Based on all the facts available before me, in my opinion the plaintiff has successfully established that there are special circumstances in their favour for the granting of the mandatory injunction. The balance of convenience also is also very much in favour of the plaintiff. Despite his clear admission of the arrears due and consequently being in breach of the agreements the defendant would not surrender the possession of the hotel to the plaintiff. Being in the hospitality business, the reputation and goodwill of the plaintiff is of paramount importance and a defect in any particular franchise would have a detrimental effect on them. The defendant has shown that he is incapable of managing the hotel as he ran into financial difficulties with his payments under the agreements almost immediately after the commencement of the operation and his situation only got worse from then on. Any further indulgence from the plaintiff would have a negative effect on the other franchises in the hotel chain. All this cannot be compensated in pure monetary terms in the form of damages.

[22] The circumstances in this case seems to be similar to the case of *Tinta Press Sdn. Bhd. v. Bank Islam (M) Sdn. Bhd.* In the present case the franchise is owed by the plaintiff as provided in the agreements; there was a clear breach of the agreement by the defendant; the circumstances showed that an injunction would be granted against the defendant; the balance of convenience was very much in favour of the plaintiff; any delay would cause irreparable damage to the plaintiff; and, the plaintiff had been helpful and accommodating to the defendant by not taking the easy way of terminating the agreement from the beginning. From all the aforesaid, I am more than convinced that the defendant does not have any real defence to the plaintiff's claim. The plaintiff's case is unusually strong and I have no hesitation to find even at this interlocutory stage that the plaintiff would succeed in

getting the mandatory injunction should this case go to trial. I therefore find that in the circumstances of this case it is just and equitable that the plaintiff's interest be protected by issue of the injunction prayed for. The plaintiff prayers (apart from prayer 2) are therefore allowed with costs.

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